

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

WAYNE A. HUSSAR, II,

Plaintiff,

vs.

DISTRICT COURT JUDGE JAMES P.
REYNOLDS, LEWIS & CLARK
COUNTY DISTRICT COURT, THE
STATE OF MONTANA ATTORNEY
GENERAL, et al.,

Defendants.

CV 19-00012-H-BMM-JTJ

FINDINGS AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE
TO DENY MOTION TO PROCEED IN
FORMA PAUPERIS

Plaintiff Wayne Hussar, a state prisoner proceeding without counsel, filed a motion to proceed in forma pauperis (Doc. 1) and a proposed Complaint (Doc. 2). Mr. Hussar is subject to the three strikes provision of 28 U.S.C. § 1915(g) and therefore the motion to proceed in forma pauperis should be denied.

Permission to proceed in forma pauperis is discretionary with the Court.

See 28 U.S.C. § 1915(a). 28 U.S.C. § 1915(g) provides as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Mr. Hussar has filed at least three civil actions which have been dismissed as frivolous or for failure to state a claim. *See Hussar v. Touchette*, CV-11-00011-H-DWM (D. Mont. May 6, 2011) dismissed as frivolous, *Hussar v. Abendroth, et al.*, CV-12-00076-M-DLC (D. Mont. October 30, 2012) dismissed for failure to state a claim, and *Hussar v. Nichals*, CV-12-00045-H-DLC (D. Mont. January 29, 2013) dismissed for failure to state a claim. None of these dismissals were appealed.

Mr. Hussar has exceeded the three “strikes” allowed by the Prison Litigation Reform Act to a prisoner attempting to proceed in forma pauperis in a federal civil lawsuit. As such, he cannot proceed in forma pauperis in the instant case unless he can show that he qualifies for the “imminent danger of serious physical injury” exception of 28 U.S.C. § 1915(g).

To meet the exception, Mr. Hussar must allege facts that demonstrate that he was “under imminent danger of serious physical injury” at the time of the filing of the complaint. *Andrews*, 493 F.3d at 1053 (“it is the circumstances at the time of the filing of the complaint that matters for the purposes of the ‘imminent danger’ exception under § 1915(g)”). Mr. Hussar is complaining about an alleged refusal to file documents in state district court. His allegations are insufficient to satisfy the imminent danger exception to section 1915(g). *Andrews v. Cervantes*,

493 F.3d 1047, 1055-56 (9th Cir. 2007). Consequently, the motion to proceed in forma pauperis should be denied.

While litigants are ordinarily given a period of time to pay the full filing fee of \$400.00, Mr. Hussar should not be allowed to do so in this case. Mr. Hussar has been made aware that he is subject to the provisions of 28 U.S.C. § 1915(g) and cannot submit such filings without payment of the filing fee or demonstrating imminent danger of serious physical harm. *See Hussar v. Lewis and Clark County Detention Center*, Civil Action No. 17cv55-H-DLC-JTJ; *Hussar v. Almandinger, et al.*, Civil Action No. 18cv51-H-DMM-JTJ.

In addition, Mr. Hussar is not entitled to a fourteen-day period to object. *See Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 (9th Cir. 1998) (per curiam). No motion for reconsideration will be entertained.

Based upon the foregoing, the Court issues the following:

RECOMMENDATIONS

1. Mr. Hussar's Motion to Proceed in Forma Pauperis (Doc. 1) should be denied pursuant to 28 U.S.C. § 1915(g).
2. The Clerk of Court should be directed to close the case and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.
3. No motions for reconsideration or rehearing will be entertained and the

Clerk of Court is directed to discard any such motions.

DATED this 31st day of January, 2019.

/s/ John Johnston
John Johnston
United States Magistrate Judge